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SUPREME COURT, U.S.

In the Supreme Court of the United States

JOSEPH TALIK,

Petitioner,

v.

FEDERAL MARINE TERMINALS, INC.,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Ohio

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Did the Ohio Supreme Court properly conclude that allowing a longshore worker to assert Ohio's "substantial certainty" intentional tort against his maritime employer would constitute an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in enacting the Longshore and Harbor Workers' Compensation Act, Section 901 *et seq.*, Title 33, U.S. Code?

CORPORATE DISCLOSURE STATEMENT

The parent company of Federal Marine Terminals, Inc. is Fednav Holdings (USA), Inc. No publicly held company owns 10% or more of Federal Marine Terminals, Inc.'s stock.

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INTRODUCTION

Petitioner Joseph Talik asks this Court to grant certiorari for the purpose of rewriting the LHWCA[1] to incorporate an aberrational common law tort action previously recognized by Ohio courts. For Petitioner to prevail, the LHWCA would have to accommodate: 1) the Ohio tort theory that "employer intentional torts ... necessarily arise outside the course of employment"[2] – a theory that the leading treatise on workers' compensation law describes as "[t]he most fictitious of all" justifications offered to evade exclusive liability provisions in workers' compensation statutes[3]; 2) a "substantial certainty" standard for intentional torts that has been rejected by the vast majority of states and was eliminated by Ohio's General Assembly in 1995; and 3) holdings of Ohio courts "that employees may recover workers' compensation benefits *and* damages for employer intentional torts"[4] – a theory of double recovery that has been recognized by *no* other state and that is antithetical to the purposes of the LHWCA.

The Ohio Supreme Court properly rejected Petitioner's attempts to contort Congress' careful balance of rights and liabilities in the LHWCA, and

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[1] Longshore and Harbor Workers' Compensation Act, Section 901 *et seq.*, Title 33, U.S. Code ("LHWCA" or "the Act").

[2] Petition for Writ of Certiorari ("Pet."), p. 1.

[3] 6 Larson's Workers' Compensation Law § 103.01, 103-5 (2007).

[4] Pet., p. 2 (emphasis added).

correctly concluded that longshore workers could not expose their maritime employers to liabilities far beyond the "no-fault" compensation benefits required by the LHWCA. The Court thoroughly analyzed state and federal courts' concurrent jurisdiction over workers' compensation claims filed by longshore employees injured in the "twilight zone" between land and sea, and correctly held that concurrent jurisdiction over no-fault *benefits* did not equate to concurrent jurisdiction over fault-based *torts*. To the contrary, Congress' intent to: 1) make compensation – not tort damages – the primary source of relief for longshore workers injured in the workplace; and 2) create a uniform compensation system for longshore workers, preempts application of the Ohio tort.

Nor does the Ohio Supreme Court decision embody any "recurring" issue (Pet., p. 1) for this Court's review. Ohio's General Assembly adopted a "deliberate intent" standard for an intentional employer tort in 2005, bringing Ohio in line with the vast majority of states and the federal common law (to the extent federal law would recognize *any* tort-based exception to workers' compensation exclusivity). The Ohio Supreme Court's ruling precluding Petitioner's attempt to take advantage of the 2004 common law tort presents no cert-worthy question for this Court.

STATEMENT OF THE CASE

A. Relevant Facts.

Respondent Federal Marine Terminals, Inc. ("Federal Marine") employs longshore workers to conduct cargo handling operations along the Great

Lakes and other U.S. shipping waterways. At all relevant times, Federal Marine has been in full compliance with its employee compensation benefit obligations under the LHWCA.

Petitioner Joseph Talik was a "checker" for Federal Marine. He and forklift operator Robert Holchin were responsible for ensuring that cargo loaded onto delivery trucks at the Cleveland, Ohio dock matched a customer's order.

On September 10, 2004, Petitioner and Holchin were assigned to fill an order for pipe from a pile of thin- and thick-walled pipe of varying diameters that had been previously unloaded from a vessel on Dock 26. After Petitioner selected three pipes from the edge of the pile, Holchin hoisted the pipes onto his forklift and drove them to the waiting truck. Before selecting additional pipes, Petitioner was supposed to wait for Holchin to return and stabilize the pile by placing the forks of his forklift under the pipe exposed by removal of the "chocked" pipes. But Petitioner did not wait. As he stepped over pipes to conduct more measurements, the pile collapsed, injuring Petitioner's leg.

Because Petitioner performed longshore operations on land appurtenant to navigable waters (known as the "twilight zone"), he was eligible for state and federal "no fault" workers' compensation benefits. Petitioner opted for, and received, Ohio workers' compensation benefits.

B. Course of Proceedings.

Less than two months after his accident, Petitioner sued Federal Marine in the Cuyahoga County Court of Common Pleas, seeking compensatory and punitive damages under Ohio's "substantial certainty" employer intentional tort. The trial court granted Federal Marine's motion for summary judgment on the grounds that Petitioner's Complaint was barred and preempted by the LHWCA. A divided Court of Appeals reversed and the Ohio Supreme Court reversed again, reinstating the trial court's judgment.[5]

The Ohio Supreme Court decision first outlines the history of the LHWCA. Originally enacted to provide "no fault" compensation for injuries on navigable waters that were not covered by state compensation statutes, the Act was amended in 1972 to protect maritime workers injured while working on land from "the consequences of filing in the wrong jurisdiction." Appx., pp. 26-27. The amendments allowed these "twilight zone" longshore workers to file for no-fault compensation benefits "in either the federal court under the LHWCA or in the state court under the state workers' compensation laws." *Id.*

The Ohio Supreme Court next outlines the tortured history of Ohio's "substantial certainty" employer intentional tort, which includes a 1982 rationale criticized by Professor Larson as "[t]he most fictitious theory of all" (Appx., p. 31, fn. 4); a 1984 expansion of

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[5] *See* Appendix to Joseph Talik's Petition for Writ of Certiorari ("Appx."), pp. 22-47.

the tort to: 1) include injuries "substantially certain" to occur; and 2) permit employees receiving workers' compensation benefits to pursue the common law tort against their employers "even though the employee had received workers' compensation benefits for the same injury" (*id.*, pp. 31-32); subsequent attempts to clarify the "confusing" substantial certainty standard (*id.*, pp. 32-33); and the Ohio General Assembly's modification of the tort by enacting a "deliberate intent" standard in 2005 – a year after Talik's injury (*id.*, pp. 33-34).

After establishing this necessary context, the Ohio Supreme Court addresses the two preemption issues before it. The Court first considers whether Petitioner's Ohio common law action is expressly preempted by § 905(a) of the LHWCA, which provides that a maritime employer's liability for "no-fault" workers' compensation benefits is "exclusive and in place of all other liability ... at law or in admiralty on account of" injury to an employee. Appx., p. 38; Pet., p. 6. Although it was undisputed that Federal Marine complied with its obligation to both contribute to the Ohio Industrial Commission and purchase a private insurance policy (for federal benefits) on behalf of Petitioner, the Court found no express preemption, concluding that because the LHWCA defines "injury" as "accidental injury" or "injury caused by the willful act of a third person," the exclusivity provision did not apply to an employer intentional tort. *Id.*, p. 39.

Implied or "conflict" preemption, however, required a different result. The Ohio Supreme Court listed three reasons for its conclusion that exposing maritime employers to "substantial certainty" tort liabilities

would act "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in enacting the LHWCA ...." Appx., p. 45. First, those courts that have recognized a *potential*[6] intentional tort exception to the LHWCA's exclusive employer liability, have limited that exception to "specific, deliberate intent" torts. *Id.*, p. 42, ¶ 32. Second, allowing a "substantial certainty" tort action to go forward would frustrate the Congressional intent in the 1972 amendments to the LHWCA "'that compensation, not tort damages, [was] to be the primary source of relief for workplace injuries for longshoremen against their employers.'" *Id.*, p. 43, ¶ 34, quoting *Peter v. Hess Oil Virgin Islands Corp.*, 903 F.2d 935, 952 (3d Cir. 1990). Third, applying Ohio's "substantial certainty" standard "would be inconsistent with the central purpose underlying the LHWCA" to create a uniform compensation system. *Id.*, p. 44, ¶ 35.

Two Justices dissented, based in large part on their failure to distinguish between "no-fault" and "fault-based" remedies. The dissent assumes that because the longshore compensation scheme enacted by Congress recognizes concurrent state/federal jurisdiction over claims for *no-fault* benefits asserted by "twilight zone" workers, it necessarily incorporates *fault-based* state tort systems. This mixing of apples

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[6] *See, e.g., Bordelon v. Avondale Industries, Inc.*, 846 So.2d 993, 996 (La. App. 2003) ("Although some cases refer to the possibility that such an exception could be made under appropriate facts, we find none that actually did so").

and oranges was properly rejected by the five-Justice majority.

ARGUMENT

The Ohio Supreme Court's conclusion that Ohio's "substantial certainty" employer intentional tort is preempted by the LHWCA presents no question worthy of this Court's review.

A. The Concurrent State and Federal Compensation Schemes for "Twilight Zone" Longshore Workers Are Not the Subject of Unresolved Questions or Recurring Issues.

The Ohio Supreme Court has not, as suggested at page 12 of Petitioner's Petition, "decided an important issue of federal law that has not been, but should be, settled by this Court." The mutual rights and obligations of injured "twilight zone" longshore workers and their maritime employers have been settled since 1980 and are not affected by the reinstatement of summary judgment in favor of Federal Marine.

The 1972 amendments to the LHWCA and this Court's decision in *Sun Ship v. Pennsylvania*, 447 U.S. 715 (1980) extended LHWCA jurisdiction landward, thereby eliminating the state/federal jurisdictional minefields that "twilight zone" longshore workers had been previously forced to navigate to obtain no-fault benefits for their workplace injuries. Since 1980, maritime employers have funded two workers' compensation benefit schemes for their "twilight zone"

longshore employees – one state and one federal – and state and federal courts have had concurrent jurisdiction over claims asserted under those benefit schemes.

As he did in the courts below, however, Petitioner continues to confuse no-fault compensation benefits with fault-based tort law. As the Ohio Supreme Court correctly points out, the intent of the 1972 Amendments, as interpreted in *Sun Ship*, was to provide injured longshore workers with the highest available workers' compensation *benefits* – state or federal – *not* to expose maritime employers to additional liabilities imposed by state *tort* law. *See* Appx., p. 43, ¶ 34. *Accord Seide v. Bethlehem Steel Corp.*, 169 Cal. App. 3d 985, 987-89 (1985) (emphasis in original):

> Plaintiff correctly argues that *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715 ... recognizes concurrent state and federal jurisdiction over *compensation claims* relating to injuries sustained by maritime employees .... [P]laintiff argues that because a state may apply its own workers' compensation law to claims arising under the LHWCA, it may also apply its own tort law under such concurrent jurisdiction. ... In recognizing concurrent federal and state jurisdiction over maritime compensation claims, *Sun Ship, Inc.* neither discussed tort law nor a state's power to apply its own tort law to claims arising under the LHWCA.

The Ohio Supreme Court decision preempts state *tort* claims that are inconsistent with the LHWCA, not

state *benefit* schemes that supplement the federal benefit scheme. Nothing in that decision conflicts with this Court's holding in *Sun Ship* that federal benefit schemes "supplement," rather than "supplant," state benefit schemes.

B. Nothing in the LHWCA or Cases Interpreting It Support Extending Concurrent Jurisdiction Over State and Federal Workers' Compensation Schemes to Embrace Aberrational State Tort Claims.

Petitioner's assertion that "allowing an injured longshoreman to bring a 'substantial certainty' intentional tort claim against his or her employer will not create inconsistency under the LHWCA" (Pet., p. 13), is incorrect. The LHWCA would have to be substantially gutted to accommodate such a tort action.

First, this Court would have to conclude that the Ohio substantial certainty tort is not expressly preempted by the exclusive liability provision of the LHWCA (33 U.S.C. § 905(a), Pet., p. 6).[7] Pursuant to

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[7] The Ohio Supreme Court's conclusion that the LHWCA's exclusivity provision did not expressly preempt employee intentional tort suits is questionable, but not necessary to its ultimate conclusion. The case cited to support that part of its decision (*Taylor v. Transocean Terminal Operators, Inc.*, 785 So.2d 860 (La. App. 2001)) should be strictly limited to its unusual facts. Absent access to an intentional tort claim, the longshore worker in *Taylor* would have been left "with no remedy at all" for his workplace injuries, contrary to the remedial purposes of the

§ 905(a), compliance with statutory requirements to fund no-fault benefits excludes "all other liability" for employee injuries "at law or in admiralty...." Pet., p. 6. The *only* exception to exclusive liability is if the employer "fails to secure payment of compensation as required by this chapter ...." *Id.*

Petitioner's reliance on cases analyzing the scope of exclusivity when the longshore worker seeks to assert a claim for a *non*-physical injury (*i.e.*, *Wallace v. Ryan-Walsh Stevedoring Co., Inc.*, 708 F. Supp. 144 (E.D. Tex 1989), quoted extensively at pp. 16-17 of the Petition) are irrelevant. Only a handful of states allow *non*-physical state-law torts like the retaliatory discharge claim in *Wallace*. *See, e.g.*, *Ex parte Bender Shipbuilding & Repair Co., Inc.*, 879 So.2d 577, 584 & 586 (Ala. 2003), citing federal cases and 2A Larson, Workmen's Compensation Law § 68.34(C), 13-145 to -146 (1987) to conclude that "the weight of authority" holds that state tort claims for non-physical injury are *preempted* by § 905(a). But even if correct, those cases offer no support for eroding maritime employers' exclusive liability for *physical* injuries under the LHWCA. Here, Petitioner seeks full tort damages from Federal Marine for the same physical injuries for which he is collecting no-fault workers' compensation. As the Sixth Circuit has noted, construing a federal

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LHWCA. 785 So.2d at 863-64. Here, in contrast, Petitioner is receiving workers' compensation benefits for his injuries.

exclusivity provision that is "essentially the same"[8] as § 905(a):

> We need not decide ... exactly when [the Federal Employees' Compensation Act] encompasses causes of action predicated entirely on nonphysical injury. The statute certainly provides the exclusive remedy for *all* damages arising out of [a] discrete personal injury ....
>
> * * *
>
> [W]hatever the underlying state law which gives rise to the potential tort claim, FECA preempts that claim.

Saltsman v. United States, 104 F.3d 787, 790-91 (6th Cir. 1997) (emphasis in original; footnote and citations omitted).

Second, assuming arguendo that the LHWCA's exclusivity provision could permit an intentional tort suit against a compliant employer, this Court would have to conclude that the "substantial certainty" standard created by Ohio courts – as opposed to a federal common law "deliberate intent" standard[9] –

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[8] *Lockheed Aircraft Corp. v. United States*, 460 U.S. 190, 194 (1983).

[9] The LHWCA was modeled on New York's workers' compensation law. *Lockheed, supra*, 460 U.S. at 194, fn. 4. New York follows the nearly universal rule that "[n]othing short of a specific intent to injure the employee" falls outside of workers' compensation

would apply to such a cause of action. Allowing the application of Ohio's "substantially certain" standard for employer intentional torts to actions filed by longshore workers would dramatically expand employer liability under the LHWCA, disrupting "the *quid pro quo* that underlies most workmen's compensation statutes – the employer provides no-fault compensation in exchange for immunity from tort liability for damages." *Peter v. Hess Oil Virgin Islands Corp.*, 903 F.2d 935, 951 (3d Cir. 1990), citing *Morrison Knudsen Construction Co. v. Director, OWCP*, 461 U.S. 624, 636 (1983).

Third, this Court would have to conclude that Ohio's unique rule allowing employees to receive workers' compensation benefits *and* full tort damages is consistent with the language and purpose of the LHWCA. The very concept is mind-boggling. Petitioner argues that the LHWCA's exclusive liability provision cannot apply to intentional employer torts because the latter "arise outside the course of employment" and the LHWCA "encompasses only accidental injuries that arise in the course of employment." Pet., p. 1 (emphasis deleted). But it is undisputed that Federal Marine funded no-fault state and federal workers' compensation schemes for the

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exclusivity. *Houston v. Bechtel Associates Professional Corp.*, 522 F. Supp. 1094, 1095 n.4 (D.C.D.C. 1981) (holding that any intentional tort action under the LHWCA would require a specific intent to injure the employee). *Accord Boston v. Johns-Manville Sales Corp. v. Bath Iron Works Corp.*, 508 F. Supp. 313 (D. Me. 1981); *Peralta v. Perazzo*, 942 So.2d 64, 67 (La. App. 2006) ("Nothing short of a special intent to injure the employee falls outside the scope of 33 USCA 905(a)").

benefit of "twilight zone" employees injured in accidents arising in the course of their employment with Federal Marine, and Petitioner *applied for and received* such benefits. By definition, then, Petitioner's injury was "accidental" and arose in the course of his employment. Nothing in the LHWCA suggests an intent to make employers liable for *double* recoveries – one "no-fault" recovery and one "fault-based" recovery.

C. Incorporating Ohio's Aberrant Common Law Tort into the LHWCA's Compensation Scheme Would Undermine the Uniformity of Compensation that Is a Fundamental Tenet of the Act.

The Ohio Supreme Court correctly concluded that allowing longshore workers injured in Ohio to pursue a "substantial certainty" tort against their maritime employers would undermine the uniform compensation that comprises an essential tenet of the LHWCA. *See, e.g., Ex parte Bender, supra*, 879 So.2d 577 (whether described as intentional fraud or intentional infliction of emotional distress, longshore worker's state tort claim was preempted by LHWCA); *Hill v. Knapp*, 914 A.2d 1193, 1194 (Md. App. 2007) (longshore worker's state, common law action against a co-employee for injuries received "when a load of plywood dropped on him from a forklift" operated by the co-employee was preempted):

> "We can perceive no greater conflict than that which would be presented if we allowed this employee to sue his co-employee because he was a land-based maritime worker, and a maritime

> worker injured on a navigable waterway would be precluded from maintaining such a suit ...."

Id. at 1203, quoting *Fillinger v. Foster*, 448 So.2d 321, 326 (Ala. 1984).

Petitioner's argument that incorporating state tort actions will not undermine the uniformity of compensation at the heart of the LHWCA (Pet., pp. 12-14), is misplaced. The premise of his argument is that because *Sun Ship* confirmed that "twilight zone" longshore workers have the option of seeking state or federal workers' compensation benefits, and state benefit schemes vary, the LHWCA must anticipate that longshore workers injured in different locales could receive differing levels of benefits. Pet., pp. 13, 15-16. That is true, as this Court held in *Sun Ship*. But differing levels of no-fault benefits does not support the injection of state *tort* claims into the no-fault scheme of the LHWCA.

In *Sun Ship*, this Court held that the fact that state remedial schemes may be more (or less) generous than the federal remedial scheme does not cause a conflict. Both schemes are based upon "no fault" principles and a "fixed" compensation scheme:

> To be sure, if state remedial schemes are more generous than federal law, concurrent jurisdiction could result in more favorable awards for workers' injuries than under an exclusively federal compensation system. But we find no evidence that Congress was concerned about a disparity between adequate federal benefits and superior state benefits.

477 U.S. at 724 (footnote omitted). State "no fault" compensation schemes complement the Act's federal "no fault" compensation scheme because both schemes award benefits *without regard to fault*. *See Peter*, *supra*, at 952 (state and federal workers' compensation schemes are "complementary" because both "ensure that every worker [has] access to a no-fault remedy"). *Fault*-based tort claims do not complement *no-fault* benefit schemes. There is a "substantial difference between liability for a fixed and determinable compensation award and liability for unlimited damages in tort." *Id.* Such conflicts require the preemption of state tort claims, which "obstruct[] the purposes of LHWCA ...." *Id.* at 953. Petitioner is comparing "apples to oranges," when he seeks to graft a "fault-based" tort scheme onto the "no fault" scheme of the LHWCA; the Ohio Supreme Court decision is perfectly consistent with *Sun Ship*.

CONCLUSION

It has long been the law that a state law claim is preempted to the extent that it "interferes with the proper harmony and uniformity of [general maritime] law in its international and interstate relations." *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 216 (1917). That is exactly what Petitioner Talik asks this Court to do. Ohio's "substantial certainty" employer intentional tort applies a standard of liability lower than a specific, deliberate intent to harm, and allows the injured employee to seek and obtain both workers' compensation benefits and full tort benefits. Allowing longshore workers to invoke the Ohio tort in actions against their maritime employers would conflict with the language and intent of the LHWCA to establish a

uniform system of "no-fault" benefits, rather than tort recoveries, for workplace injuries. The case presents no important federal issue and certiorari should be denied.

Respectfully submitted,

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